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No. 89-320

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL DEMOCRATIC POLICY COMMITTEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's imposition of civil contempt sanctions against petitioner for refusing to comply with grand jury subpoenas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 871 F.2d 156. The opinion of the district court (Pet. App. 16a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on March 29, 1989. A petition for rehearing was denied on May 30, 1989 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on August 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the subject of a criminal investigation launched several years ago by a federal grand jury sitting in the District of Massachusetts. The grand jury was investigating possible violations of federal law, including credit card fraud and mail fraud, in violation of 18 U.S.C. 1029 and 1341. The investigation related to the activities of petitioner and others in connection with soliciting political campaign contributions for Lyndon LaRouche and other candidates. Petitioner and others were suspected of fraudulently altering credit card donations to reflect charges for larger sums in order to obtain and keep the accrued interest from issuing banks; once the donors informed those banks that the larger charges were unauthorized, petitioner and others would return the principal but retain the accrued interest. See *In re Grand Jury Proceedings*, 795 F.2d 226, 227-228 (1st Cir. 1986), cert. denied, 479 U.S. 1064 (1987); note 4, *infra*; Gov't C.A. Br. 2.

On February 6, 1985, one week after service was first refused, petitioner was served with a grand jury subpoena calling for specific documents covering a certain time period related to the criminal investigation. The subpoena directed petitioner, through a representative, to appear before the grand jury on February 7 and produce "[a]ny and all records relating to fundraising by, through, or on behalf of [petitioner]," including "records and/or correspondence relating to the use of credit card accounts and/or charges for fundraising purposes." C.A. App. 343, 345. Petitioner's representative did not appear before the grand jury on February 7, nor did petitioner produce the subpoenaed records. As a result, petitioner's grand jury appearance was rescheduled for February 14. Once again, however, peti-

tioner ignored the subpoena. *In re Grand Jury Proceedings*, 795 F.2d at 227-228; Gov't C.A. Br. 3.[1]

On the government's motion, the district court issued an order directing petitioner to show cause why it should not be held in contempt. The court scheduled a hearing for March 29, 1985. Petitioner did not appear at that hearing. After finding that petitioner had been served with the subpoena and that its failure to comply was without just cause, the district court adjudged petitioner in contempt. The court ordered petitioner "to pay the sum of $10,000 per day to the Clerk of the United States District Court for Massachusetts until such time as [petitioner] shall fully comply with said subpoena." *In re Grand Jury Proceedings*, 795 F.2d at 228 (internal quotation marks omitted). The court stayed its order until April 2. *Ibid.*

On April 3, 1985, petitioner filed a motion to vacate the contempt order and quash the subpoena. After a hearing, the district court denied that motion. *In re Grand Jury Proceedings*, 795 F.2d at 228.[2]

With the contempt fine mounting for each day of violation, petitioner in early April suggested that it finally would appear before the grand jury and comply with the subpoena. On April 9, the district court therefore deferred ruling on petitioner's motion to purge its contempt pending

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[1] The grand jury had also issued subpoenas to three other firms suspected of fraud in connection with soliciting campaign contributions for Lyndon LaRouche and other candidates. Those firms, Campaigner Publications Inc., Fusion Energy Foundation, and Caucus Distributors, Inc., likewise refused to comply with the subpoenas and also were ultimately subjected to civil contempt sanctions. See generally *In re Grand Jury Proceedings*, 795 F.2d 226 (1st Cir. 1986), cert. denied, 479 U.S. 1064 (1987).

[2] Petitioner did not file a timely notice of appeal from the contempt order; that order therefore became final in 1985. See *In re Grand Jury Proceedings*, 795 F.2d at 229.

its expected appearance before the grand jury, but petitioner failed to make arrangements to appear. As a result, the district court on April 22 entered an order of partial summary judgment in the amount of $70,000 against petitioner for its failure to comply with the grand jury subpoena from April 2 through April 8. *In re Grand Jury Proceedings*, 795 F.2d at 229; Gov't C.A. Br. 4.

In spite of that order, petitioner persisted in its noncompliance. On May 21, 1985, the district court held a hearing to determine whether petitioner had started to comply. The government told the court that petitioner had produced some, but not all, of the responsive documents and explained that petitioner had failed to send to the grand jury a representative capable of verifying that it was in fact turning over all fundraising records demanded by the subpoena. The court then directed petitioner to designate an official who could testify before the grand jury as to whether petitioner had fully complied with the subpoena. Petitioner refused to heed the court's directive and did not send any official to testify. Accordingly, on July 19 the district court denied petitioner's motion to purge its contempt and quash the subpoena. *In re Grand Jury Proceedings*, 795 F.2d at 229; Gov't C.A. Br. 5.

2. On August 2, 1985, with the contempt fine mounting each day in light of petitioner's continued noncompliance, petitioner appealed from the district court's initial contempt order, its partial summary judgment order, and its most recent order refusing to purge the contempt or quash the subpoena. In an order dated December 5, 1985, the court of appeals dismissed petitioner's appeal from the initial contempt order, since petitioner had not filed a timely notice of appeal from that order. In addition, the court held that the district court's denial of the motion to quash was a nonappealable order. See *In re Grand Jury Proceedings*,

795 F.2d at 229. Finally, on July 3, 1986, the court of appeals affirmed the $70,000 partial summary judgment order. *Id.* at 228-230.

3. On July 9, 1986, the government contacted petitioner in an effort to obtain compliance with the subpoena. By September 1, however, petitioner still had not acted. The government therefore filed a second motion for partial summary judgment in the amount of $5,110,000 against petitioner for its failure to comply with the grand jury subpoena from April 9, 1985, through September 1, 1986. Petitioner opposed the motion, claiming that it had fully complied with the subpoena; petitioner also asked the court to order the government to produce its evidence of noncompliance at a hearing. Gov't C.A. Br. 9-10.

On October 6, 1986, federal agents executed search warrants at offices in Quincy, Massachusetts, and Leesburg, Virginia, that were associated with the suspected illicit fundraising for Lyndon LaRouche. The agents seized a substantial number of documents that had been demanded by the grand jury subpoena served on petitioner.[3] Thereafter, on November 12, the government filed an affidavit by FBI Special Agent Martha Wilkes, substantiating its claim of petitioner's noncompliance. Specifically, Agent Wilkes

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[3] That same day, the federal grand jury returned a 117-count indictment against Lyndon LaRouche and individuals and firms associated with his activities. See Gov't C.A. Br. 10.

On January 27, 1989, LaRouche and six other individuals were convicted and sentenced to terms of imprisonment for federal criminal offenses committed in connection with fraudulent fundraising activities in the Eastern District of Virginia. *United States* v. *LaRouche*, Crim. No. 88-243-A (E.D. Va.), appeal pending (4th Cir.). As a result of the successful prosecution in the Eastern District of Virginia, the government has not pursued similar charges in the District of Massachusetts against those defendants who were convicted in the Virginia criminal case.

attested that thousands of index cards, which catalogued and tracked individual donors in order to coordinate fundraising, were found in those offices; a number of those cards contained notations to petitioner. Agent Wilkes further stated that many of the cards contained notations predating the issuance of petitioner's subpoena, and that none of the index cards had previously been produced before the grand jury. Pet. App. 5a; Gov't C.A. Br. 10-12; see C.A. App. 482, 487 (samples of cards with notations to petitioner attached to Agent Wilkes' affidavit).

On December 12, 1986, the district court denied petitioner's motion to stay proceedings on the government's partial summary judgment motion, but gave petitioner 20 days (later extended to January 9, 1987) within which to respond to the government's proof. On January 19, 1987, petitioner filed a supplementary memorandum in opposition to the government's motion, together with a supporting affidavit, claiming that it had already "'produced a wealth of material,'" and that "no one has ever contended that the [index] cards belonged to [petitioner]." C.A. App. 512; see Pet. App. 6a; Gov't C.A. Br. 14-15.

On February 24, 1987, after reviewing the submissions filed by both the government and petitioner, the district court found that "the uncontroverted record shows that the critical index cards called for by the subpoena were not produced, although clearly available for production to the grand jury." Pet. App. 18a-19a.[4] The court further found that "[w]hile a supplemental memorandum in opposition [to the government's partial summary judgment motion] was filed * * * on behalf of [petitioner] * * *, no factual issue

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[4] As the district court further noted, "the record * * * shows that many of the index cards were burned." Pet. App. 19a.

material to this matter was put in dispute." *Id.* at 19a.[5] Accordingly, the district court "accept[ed] the verified and undisputed facts of the Wilkes affidavit," *ibid.*, and thus granted the government's motion for partial summary judgment against petitioner in the amount of $5,110,000. *Id.* at 21a.

Petitioner then moved for reconsideration or, in the alternative, a stay pending appeal. Petitioner claimed, among other things, that it could no longer be held in contempt for failing to comply with the original subpoena since the term of the grand jury had expired in January 1986. C.A. App. 579-583. On May 31, 1987, the district court denied petitioner's motion. *Id.* at 595.

4. On appeal, petitioner contended that the district court erred in assessing massive contempt fines in its February 26, 1987, order, since the government had already seized the subpoenaed records and the original grand jury investigation had ended. After finding that petitioner "overlooks prior history [of this case]," Pet. App. 7a, the court of appeals rejected that claim, holding that the district court's action "was not the imposition of a punitive fine but the recognition and liquidation of the debt accumulated during the period of noncompliance." *Id.* at 8a.[6] As the

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[5] The district court also concluded that petitioner's opposition to the government's motion did not comply with the procedure mandated by Local Rule 18, specifying that "[o]ppositions to motions for summary judgment shall include a concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions, and other documentation" (D. Mass. R. 18). Pet. App. 19a.

[6] To the extent that petitioner challenged the aggregate fine as excessive, the court of appeals concluded that petitioner could not "trundle[ ] out [that issue] for the first time on this appeal." Pet. App. 7a. Petitioner had not raised the argument at the appropriate time, namely, "when the daily rate was set" in the district court's initial

court of appeals observed, *ibid.*:

> [T]o allow [petitioner] to avoid the consequences of [its] civil contempt solely because, at the date of reckoning, compliance is impossible would only encourage stonewalling.

The court of appeals also rejected petitioner's contention that the Wilkes affidavit was insufficient proof of petitioner's noncompliance with the grand jury subpoena. First, the court noted that petitioner had not raised this argument before the district court. Second, the court found that the Wilkes affidavit itself contained assertions that petitioner had not produced the index cards under subpoena before the agents seized them, and petitioner had not submitted any responsive pleading or affidavit contradicting those assertions. Indeed, as the court of appeals noted, petitioner had not submitted "any disavowal of references to [petitioner] in the [index] cards attached to the Wilkes affidavit." Pet. App. 9a.

For that reason as well, the court of appeals dismissed petitioner's claim that the district court erred in deciding the government's summary judgment motion without a hearing. As the court of appeals concluded, "[u]nder these circumstances we see no abuse of discretion or violation of due process in proceeding, after such an absence of invited factual response, to decision without an evidentiary hearing." Pet. App. 9a.

Finally, the court of appeals agreed with petitioner's claim that "a judicial order imposing a continuing per diem

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March 29, 1985, order. *Ibid.* Moreover, petitioner had not filed a timely appeal from the district court's initial order, and as the court of appeals observed, petitioner had not even sought to contest the amount of the contempt fine in its aborted appeal from that order. *Ibid.*

fine does not have a longer life than the grand jury for which the order was issued." Pet. App. 10a. Since the grand jury that issued the underlying subpoena to petitioner expired sometime in January 1986, the court of appeals vacated the $5,110,000 total judgment against petitioner and remanded the case to the district court "for computation of the aggregate fine[ ]." *Id.* at 15a.

5. On April 27, 1989, while a petition for rehearing was pending in the court of appeals, the government filed a motion in the district court to compute petitioner's aggregate contempt fines in the amount of $2.77 million. On May 30, the court of appeals denied the petition for rehearing. Pet. App. 1a. On June 6, the court of appeals denied petitioner's request to stay the mandate pending the filing of a petition for a writ of certiorari. Appl. App. C1.[7] The court issued its mandate on the following day. On June 23, the government renewed its motion in the district court to compute petitioner's fine on remand. Appl. App. H1.

Petitioner then filed an application for a stay of the court of appeals' judgment pending the filing and disposition of a petition for a writ of certiorari. On June 30, 1989, Justice Brennan, sitting as Circuit Justice, denied the application for a stay.[8]

ARGUMENT

The court of appeals' decision correctly applies settled law and procedures governing the imposition of civil contempt fines for failing to comply with grand jury

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[7] "Appl. App." refers to the appendix filed with petitioner's application for a stay in this Court.

[8] The government's motion to compute petitioner's fine remains under advisement in the district court.

subpoenas. As the court of appeals recognized, the procedural history of this case itself renders petitioner's claims insubstantial. At bottom, petitioner seeks to this day to avoid responsibility for the consequences of its longstanding and unjustified refusal to comply with valid grand jury process.

1. Petitioner first contends (Pet. 6-7) that the court of appeals' decision affirming the imposition of contempt sanctions without requiring a hearing conflicts with settled law. Petitioner's contention stems from a misreading of both the record and relevant case law.

First, the district court adjudged petitioner in contempt on March 29, 1985, only after holding a hearing in which it was established that petitioner had been served with the subpoena and that its failure to comply was without just cause. Petitioner's belated challenge rings hollow where the record shows that despite specific notice, it chose not even to attend that scheduled show cause hearing. *In re Grand Jury Proceedings*, 795 F.2d at 228.

Moreover, before ultimately rendering its judgment in February 1987, the district court specifically directed petitioner to present material evidence contradicting the government's Wilkes affidavit, since that affidavit showed that, by withholding the index cards, petitioner had not fully complied with the subpoena. Nevertheless, petitioner did not submit any responsive pleading or affidavit contradicting the government's proof. As the court of appeals noted, petitioner did not submit "any disavowal of references to [petitioner] in the [index] cards attached to the Wilkes affidavit." Pet. App. 9a. Accordingly, while petitioner was given the opportunity to have a hearing, it in effect chose not to have one.

Second, although a contemnor is generally entitled to a hearing before being adjudged in civil contempt, see, *e.g.*,

In re Oliver, 333 U.S. 257, 275 (1948), that procedure is not required where the contemnor himself has not alleged that there is a genuine issue as to any material fact, see, *e.g.*, *In re Grand Jury Proceedings*, 795 F.2d at 234-235; *Commodity Futures Trading Comm'n* v. *Premex, Inc.*, 655 F.2d 779, 782 n.2 (7th Cir. 1981); *United States* v. *Danenza*, 528 F.2d 390, 392-393 (2d Cir. 1975); see also *In re Kitchen*, 706 F.2d 1266, 1273 (2d Cir. 1983) (district court may require an offer of proof before conducting a hearing).[9] Indeed, as this Court has recognized in a related context, "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp.* v.

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[9] In the *Kitchen* case, 706 F.2d at 1273, the Second Circuit recognized that a district court need not conduct an evidentiary hearing if there are no material facts in dispute surrounding the contempt motion. Thus, petitioner's claim of conflict (Pet. 6) between the court of appeals' decision and the decision in *Kitchen* is illusory.

Petitioner's reliance (Pet. 6-7) on decisions of this Court and other courts of appeals is also misplaced. None of those decisions remotely suggests that a court must hold a hearing before adjudging a recalcitrant witness in civil contempt and imposing coercive sanctions where the witness has not rebutted the government's proof that he has not complied with a court order or grand jury process and has no just cause for such contumacious conduct.

Petitioner's reference to *McNeil* v. *Director*, 407 U.S. 245 (1972), is particularly far afield. In that case, the State of Maryland asserted the power to confine a "defective delinquent" indefinitely, even after his sentence expired, "without ever obtaining a judicial determination that such confinement is warranted." 407 U.S. at 249. In rejecting the State's effort to ground that power on a "theory of civil contempt," the Court made clear that "due process requires a hearing to determine whether [the inmate] has in fact behaved in a manner that amounts to contempt." *Id.* at 251. The Court thus had no occasion to address the issue petitioner seeks to present–the need for such a hearing where the record contains uncontradicted proof that contumacious conduct has occurred.

Catrett, 477 U.S. 317, 326 (1986).

Here, as mentioned above, the government's proof showed that petitioner, over a substantial period of time, withheld from the grand jury index cards used in connection with the fundraising activities under investigation. See Pet. App. 2a-4a; Gov't C.A. Br. 10-12; C.A. App. 482, 487 (samples of cards with notations to petitioner attached to Agent Wilkes' affidavit). Despite the district court's invitation, petitioner did not contradict a single allegation in the Wilkes affidavit. To the contrary, petitioner raised only immaterial claims, namely, that it had already "'produced a wealth of material,'" and that "no one has ever contended that the [index] cards belonged to [petitioner]." C.A. App. 512.[10] On this record, the district court was compelled to grant the government's motion for summary judgment since there was no factual dispute regarding petitioner's actions. Pet. App. 18a-19a. Accordingly, the court of appeals correctly held that "[u]nder these circumstances we see no abuse of discretion or violation of due process in proceeding, after such an absence of invited factual response, to decision without an evidentiary hearing." *Id.* at 9a.

2. Petitioner next contends (Pet. 8-9) that the court of appeals sanctioned a contempt adjudication without first

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[10] Rather than addressing these points, petitioner cites (Pet. 3-4) a supplemental affidavit that, as both the district court and the court of appeals found, does not contradict any material facts regarding petitioner's failure to comply with the grand jury subpoena.

Petitioner also suggests (Pet. 2-3) that the grand jury subpoena itself did not call for the production of the index cards used for fundraising purposes, and that this omission may have excused petitioner's contemptuous conduct. That suggestion is frivolous. The grand jury subpoena specifically commanded petitioner to produce "[a]ny and all records relating to fundraising by, through, or on behalf of [petitioner]." C.A. App. 343. The index cards fall within the plain language of the subpoena.

requiring "clear and convincing" evidence, and that this decision conflicts with other circuits' decisions.[11] Petitioner, however, misconstrues the court of appeals' decision. The court of appeals did initially state that petitioner had waived its challenge to the sufficiency of the Wilkes affidavit. Pet. App. 8a.[12] But the court proceeded to review the entire record to hold that petitioner did not present any evidence contradicting the government's proof of failure to comply with the subpoena. *Id.* at 8a-9a. The court of appeals upheld the contempt citation only after concluding that petitioner had not rebutted the government's factual submission, a submission that on this record certainly meets the "clear and convincing" evidence standard.[13] The court thus in effect applied that standard, and its decision is therefore consistent with the decisions of other courts of appeals.

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[11] *Stotler & Co.* v. *Able*, 870 F.2d 1158, 1163 (7th Cir. 1989); *Balla* v. *Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989); *Washington-Baltimore Newspaper Guild* v. *Washington Post Co.*, 626 F.2d 1029 (D.C. Cir. 1980).

[12] As the court of appeals stated (Pet. App. 8a):

> We dispose first of arguments that the affidavit was defective because of hearsay and because it did not constitute clear and convincing proof. These arguments were not made in the district court and we therefore do not deal with them here.

Petitioner suggests that the court of appeals effectively adopted a new pleading requirement – that "an alleged contemnor [must] specifically mention that [the clear and convincing standard] is the applicable standard of proof" (Pet. 8). To the contrary, the court of appeals was only applying an established principle to the facts, namely, that petitioner could not challenge defects in the affidavit for the first time on appeal. Application of that principle does not at all suggest that the court of appeals ignored an independent legal rule with respect to the matter of the appropriate burden of proof.

[13] For that reason as well, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), cited by petitioner (Pet. 8-9), is inapposite.

3. Petitioner further contends (Pet. 9-10) that the court of appeals erred in upholding the contempt sanction without first requiring the district court to consider petitioner's financial resources. But that issue is not presented here. As the court of appeals found, petitioner raised this challenge "for the first time on this appeal." Pet. App. 7a. Petitioner did not raise the argument at the appropriate time, namely, "when the daily rate was set" in the district court's initial March 29, 1985, order. *Ibid.* See *In re Grand Jury Witness*, 835 F.2d 437, 442-443 (2d Cir. 1987). Moreover, petitioner did not file a timely appeal from that initial order, see *In re Grand Jury Proceedings*, 795 F.2d at 229, and, as the court of appeals observed, petitioner did not even contest the amount of the contempt sanction in its aborted appeal from that order. Pet. App. 7a. As the aggregate amount of the fine was increasing over a substantial period of time, petitioner never asked the district court to reconsider the fine in light of its financial resources. Under these circumstances, petitioner is in no position to contest the amount of that fine now.

In any event, petitioner's claim is meritless. In exercising its discretion with respect to civil contempt sanctions, the district court must consider "the character and magnitude of the harm threatened by continued contumacy," "the probable effectiveness of any suggested sanction in bringing about the result desired," and "the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947). Here, petitioner's persistent refusal to comply with the grand jury subpoena threatened to thwart an ongoing criminal investigation.[14] And the imposition of a per diem

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[14] Indeed, although noticeably absent from petitioner's statement

fine, designed only to coerce petitioner to honor the grand jury subpoena, is an accepted practice well within the bounds of the district court's discretion. See, *e.g.*, *United States* v. *City of Yonkers*, 856 F.2d 444, 460 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989); *In re Grand Jury Witness*, 835 F.2d at 440; *In re Grand Jury Impaneled Jan. 21, 1975*, 529 F.2d 543, 550-551 (3d Cir.), cert. denied, 425 U.S. 992 (1976).

Finally, the $10,000 per diem fine is not excessive on this record. By its own earlier admission,[15] petitioner raises at least $400,000 in contributions annually, and thus is not an insubstantial organization. And petitioner never sought to show, before either the district court or the court of appeals, that the daily fine would be unduly burdensome. Cf. *United States* v. *City of Yonkers*, 856 F.2d at 460 (fine of $1 million per day after 15 days of City's noncompliance); *In re Grand Jury Witness*, 835 F.2d at 440 (fine of $5,000 per day imposed on individual); *International Business Machines Corp.* v. *United States*, 493 F.2d 112, 115-116 (2d Cir. 1973) (fine of $150,000 per day imposed on corporation), cert. denied, 416 U.S. 995 (1974). Furthermore, petitioner is in no position to complain now since it "was given the power to avoid the fine entirely or to end its accrual." *Perfect Fit Industries, Inc.* v. *Acme Quilting Co.*, 673 F.2d 53, 58 (2d Cir.), cert. denied, 459 U.S. 832 (1982).

4. Lastly, petitioner contends (Pet. 11-12) that the court of appeals' decision conflicts with *Shillitani* v. *United*

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of the case, petitioner *never* fully complied with the grand jury subpoena. The grand jury was able to obtain the index cards used for fundraising, and thus to complete its investigation, only after the government executed search warrants.

[15] See petitioner's Application For Stay, No. A-1049, at 3.

States, 384 U.S. 364 (1966), since "there will be no time limit on contempt proceedings in connection with a grand jury whose work has ended." Pet. 11. That contention is groundless. The district court's order granting summary judgment "was not the imposition of a punitive fine but the recognition and liquidation of the debt accumulated during the period of noncompliance" when compliance was still possible. Pet. App. 8a.[16] Thus, the court of appeals' decision is wholly consistent with *Shillitani*. Indeed, as the court of appeals succinctly stated, "to allow [petitioner] to avoid the consequences of [its] civil contempt solely because, at the date of reckoning, compliance is impossible would only encourage stonewalling." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1989

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[16] In making this claim, petitioner appears to overlook that part of the court of appeals' judgment vacating the imposition of the daily fine for the period after the grand jury expired. See Pet. App. 10a-15a.

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